UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
Newport News Division

J.F.S., a minor child by next friend and sibling Matthew P. Starbuck,

Plaintiff,

v. **ACTION NO. 4:18cv63**

WILLIAMSBURG JAMES CITY COUNTY SCHOOL BOARD,

Defendant.

DISMISSAL ORDER

This matter is before the Court for a review of the materials received in response to the Court's June 13, 2018 Order to Show Cause. *See* Order Show Cause, ECF No. 2. For the reasons set forth below, this action is **DISMISSED** without prejudice.

I. Background

On May 30, 2018, Matthew P. Starbuck ("Mr. Starbuck"), appearing *pro se* and on behalf of his minor sibling, J.F.S., submitted an application to proceed *in forma pauperis* ("IFP Application"), along with a proposed Complaint. IFP Appl., ECF No. 1. On June 13, 2018, the Court granted Mr. Starbuck's IFP Application and directed the Clerk to file Mr. Starbuck's Complaint; however, the Court explained that "[b]efore this action may proceed any further, the Court must address issues related to Mr. Starbuck's *pro se* status." Order Show Cause at 1-2.

In his Complaint, Mr. Starbuck alleges that on February 15, 2018, J.F.S., a high school student, was engaged in a conversation with other students regarding the school shooting in Parkland, Florida that occurred the day before. Compl. at 1-2, 5-6, ECF No. 3. During the conversation, J.F.S. made comments about "the intent of the shooter," the shooter's capability to

inflict "more harm had he wanted to," the shooter's "possession of explosives," the length of "time the shooter was left alone within the building unchallenged by local law enforcement," and the shooter's "use of the fire alarm to lure students out." *Id.* at 2, 6. A teacher overheard the conversation and contacted school administrators and the police. *Id.* at 6. Mr. Starbuck claims that the teacher's report was "cleared" as "unfounded" by the school police officer because he "believed there was no threat made and no criminal offense under the Code of Virginia." *Id.* Nevertheless, Defendant Williamsburg James City County School Board ("Defendant") imposed upon J.F.S. an in-school suspension for the remainder of the academic day on February 15, 2018, as well as a subsequent two-day, out-of-school suspension. *Id.* at 6-7. On "the following Tuesday," the assistant principal, a hearing officer, a guidance counselor, J.F.S., Mr. Starbuck, and J.F.S.'s mother attended a meeting to discuss the issues.[1] *Id.* at 7.

Mr. Starbuck believes that Defendant mishandled the suspensions, and specifically finds fault with the following alleged actions:

- after the teacher overheard J.F.S.'s remarks regarding the school shooting, J.F.S. was placed on in-school suspension "for the remainder of the academic day, without being informed of the reasons for which he was there;"
- J.F.S. "was subjected to multiple interrogations by school officials, to include psychologists, service counselors, and principals;"
- "the suspending assistant principal" did not contact J.F.S.'s parent until "17:30 that night," and, at that time, he verbally explained that J.F.S. was placed on out-of-school suspension for the next two days;

[1] According to the Complaint, the conversation regarding the school shooting and the in-school suspension occurred on Thursday, February 15, 2018. Compl. at 1, ECF No. 3. The out-of-school suspension occurred on "the following two days," *i.e.*, Friday, February 16, 2018, and Monday, February 19, 2018. *Id.* at 7. As such, it appears to the Court that the meeting held on "the following Tuesday" occurred on Tuesday, February 20, 2018, the day J.F.S. returned from his out-of-school suspension. *Id.*

- Defendant submitted a "formal" Notice of Suspension on February 26, 2018, but the notice did not reference the in-school suspension;

- a written Notice of Appeal was submitted to Defendant on J.F.S.'s behalf on February 27, 2018, but Defendant did not respond to the Notice of Appeal within thirty days;[2] and

- Defendant initially characterized J.F.S.'s comments as "[t]hreats," but later recharacterized them as a "classroom disturbance."

Id. at 2, 6-9.

Mr. Starbuck claims that Defendant violated J.F.S.'s due process rights under the Fourteenth Amendment by (i) arbitrarily suspending J.F.S. "without considering the context of the statements" made by J.F.S., (ii) failing to provide adequate notice of the basis for J.F.S.'s in-school suspension, (iii) failing to "allow J.F.S. an opportunity to refute those allegations and face his accusations," (iv) suspending J.F.S. "in the evening, hours after school was dismissed," (v) failing to provide a "formal written Notice of Suspension within a reasonable time," and (vi) failing to properly respond to the timely filed appeal. *Id.* at 9-11. Mr. Starbuck further claims that Defendant's decision to suspend J.F.S. violated his "Right to Free Speech, as protected by the First Amendment." *Id.* at 9.

II. The Court's Order to Show Cause

After a thorough review of Mr. Starbuck's Complaint, the Court issued an Order to Show Cause on June 13, 2018, that stated, in part:

> Mr. Starbuck, who does not appear to be a licensed attorney, seeks to litigate this action on behalf of J.F.S. on a *pro se* basis. As this Court has explained: "Although 28 U.S.C. § 1654 gives litigants the right to bring civil claims *pro se*, courts are nearly unanimous in holding that a parent or guardian cannot sue on behalf of a child without securing counsel." *Gallo v. United States*, 331 F. Supp. 2d 446, 447 (E.D. Va. 2004) (noting that "[i]t

[2] In his Complaint, Mr. Starbuck admits that although Defendant has an "internal policy" that "grants them thirty days to acknowledge and close all appeals of long term suspensions[,] . . . [t]here is no explicit policy for reviewing a short term suspension." Compl. at 8, ECF No. 3.

> is generally not in the interest of a child to be represented by a non-attorney, who will likely be unable to adequately protect her rights and vigorously prosecute litigation on her behalf"); *see also Myers v. Loudoun Cty. Pub. Sch.*, 418 F.3d 395, 401 (4th Cir. 2005) (holding that "non-attorney parents generally may not litigate the claims of their minor children in federal court").

Order Show Cause at 2-3. In its Order to Show Cause, the Court recognized that "[c]ourts have developed exceptions to this general rule for certain types of cases," such as social security litigation; however, the Court explained that "no such exception appears to apply to Mr. Starbuck's circumstances." *Id.* at 3 n.2 (citing *J.M. v. Colvin*, No. 2:15cv475, 2016 U.S. Dist. LEXIS 183976, at *22-24 (E.D. Va. Dec. 22, 2016) (allowing a non-attorney parent to bring a social security action on behalf of a minor child)).

Although it appeared to the Court that dismissal was warranted, the Court chose not to immediately dismiss this action. Instead, in deference to Mr. Starbuck's *pro se* status, the Court provided Mr. Starbuck with an opportunity to address the issues raised by the Court. *Id.* at 3. The Court stated:

> Mr. Starbuck is hereby **ORDERED** to obtain counsel for J.F.S. or **SHOW CAUSE** why this action should not be dismissed for the reasons set forth above. Mr. Starbuck must respond to this Court within thirty days from the date of entry of this Order to Show Cause.

Id.

III. Responses to the Order to Show Cause

On July 3, 2018, Mr. Starbuck filed a response to the Court's Order to Show Cause ("Response") and a brief in support of his Response ("Supporting Brief"). Resp., ECF No. 4; Supporting Br., ECF No. 5. Mr. Starbuck also submitted a memorandum from J.F.S ("J.F.S. Memorandum"), which the Court filed under seal. J.F.S. Mem., ECF No. 6. On July 11,

2018, Mr. Starbuck filed an exhibit to support his previously filed Response ("Exhibit").[3] Ex., ECF No. 7.

In his Response, Mr. Starbuck states that despite "multiple attempts and efforts" to retain an attorney on behalf of J.F.S., he has been unable to do so. Resp. at 1. Mr. Starbuck admits that "he is not a licensed attorney;" however, he asks the Court to allow him to proceed on J.F.S.'s behalf because (i) he "has been responsible for all actions involving this matter," (ii) he "is competent to understand and file proper proceedings before this Court," (iii) he "works closely with J.F.S., and the two work cohesively to act in the best interest of J.F.S. and the two believe that the unison of the two is sufficient to properly protect, defend and hold the rights of J.F.S. vigorously," (iv) he "understands the federal Rules of Discovery, and would be able to appropriately act and submit in accordance with federal rules," (v) J.F.S. is "an intelligent young man," who is seventeen years of age and "able to understand and comprehend the Rules of this Court, proper etiquette and proceedings," and (vi) "the possible political nature of this action prevents the retention of trained counsel."[4] *Id.* at 1-2. Mr. Starbuck suggests that if he is not allowed to proceed on J.F.S's behalf, the Court should "appoint a guardian ad litem to represent J.F.S. in the proceedings." *Id.* at 3.

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[3] The Exhibit filed by Mr. Starbuck consists of a letter from the Legal Aid Society of Eastern Virginia in which the entity explains that it is unable to represent J.F.S. in this action. Ex., ECF No. 7.

[4] In addition to the factual arguments set forth in his Response, Mr. Starbuck also raised legal arguments in his Supporting Brief. Supporting Br., ECF No. 5. For example, Mr. Starbuck cites to *Maldonado v. Apfel*, 55 F. Supp. 2d 296 (S.D.N.Y. 1999), a case that authorized parents to represent their minor children in federal court without an attorney. *Id.* at 1-3. However, *Maldonado* involved social security litigation and, as the Court explained in its Order to Show Cause, courts have developed an exception to the general rule prohibiting parental *pro se* representation of minors in social security litigation cases. Order to Show Cause at 3 n.2, ECF No. 2. Such exception does not apply to this action.

In the J.F.S. Memorandum, J.F.S. states that he and Mr. Starbuck "lack the financial ability to hire counsel for this case and the search for *Pro Bono* counsel has come up empty handed." J.F.S. Mem. at 1-2. J.F.S. further states that he "hold[s] the psychological capacity to represent [him]self, through Mr. Matthew Starbuck," and is "fully confident and understanding of [their] own ability to pursue this case further." *Id.* at 2. J.F.S. characterizes this case as an "appeal of a body of Government's actions" that will "only require[] common reason," and would not be "impractical" for a *pro se* litigant. *Id.* For these reasons, J.F.S. asks the Court to either "appoint a *Guardian Ad Litem*," or "allow this case to proceed without counsel." *Id.*

IV. Representation Issues

Although the Court appreciates the willingness of Mr. Starbuck to assist his sibling in his legal endeavors, the Court is bound by the law. As the Court explained in its Order to Show Cause, with narrow exceptions that do not apply in this case, "courts are nearly unanimous in holding that a parent or guardian cannot sue on behalf of a child without securing counsel." Order Show Cause at 2 (citing *Gallo v. United States*, 331 F. Supp. 2d 446, 447 (E.D. Va. 2004); *Myers v. Loudoun Cty. Pub. Sch.* 418 F.3d 395, 401 (4th Cir. 2005)). Accordingly, the Court cannot authorize Mr. Starbuck to proceed in this action as a *pro se* litigant on behalf of J.F.S.

As noted above, Mr. Starbuck and J.F.S. suggest that if Mr. Starbuck's request to represent J.F.S. in this action is denied, the Court should "appoint a guardian ad litem." Resp. at 3; J.F.S. Mem. at 2. However, this suggestion does not resolve the representation issue because the guardian ad litem would likewise be unable to represent the interests of J.F.S. without an attorney. *Johns v. Cty. of San Diego*, 114 F.3d 874, 876 (9th Cir. 1997) (explaining that a guardian ad litem cannot represent a child in court without retaining a lawyer).

Pursuant to 28 U.S.C. § 1915(e)(1), the Court has discretion to appoint counsel for J.F.S. 28 U.S.C. § 1915(e)(1) (authorizing the court to "request an attorney to represent any person unable to afford counsel"). However, the United States Court of Appeals for the Fourth Circuit has explained that the appointment of counsel in civil actions "should be allowed only in exceptional cases." *Cook v. Bounds*, 518 F.2d 779, 780 (4th Cir. 1975). "Exceptional cases" may be found in "meritorious cases involving particularly complex factual or legal issues." *Ferrer v. Garasimowicz*, No. 1:13cv797, 2013 U.S. Dist. LEXIS 139939, at *3 (E.D. Va. Sept. 27, 2013). Here, the Court finds that the facts and legal issues set forth in the Complaint are not sufficiently complex to justify the assistance of appointed counsel. *See* J.F.S. Mem. at 2 (noting that this case "only requires common reason," and would not be "impractical" for a *pro se* litigant).

Because this case was brought by a non-attorney on behalf of a minor who cannot represent himself due to his age, the Court's decision not to appoint counsel necessarily leads to the dismissal of this action. In recognition of this inevitable outcome, prior to denying counsel in cases such as this, some courts have analyzed the factual allegations of the complaint to determine whether they present a "substantial claim" that is "likely to be of substance." *A.M. v. New York City Dep't of Educ.*, 840 F. Supp. 2d 660, 676 (E.D.N.Y. 2012); *Mills v. Fischer*, No. 09-CV-0966A, 2010 U.S. Dist. LEXIS 8076, at *4 (W.D.N.Y. Feb. 1, 2010). Here, the Court finds that the factual allegations set forth in the Complaint do not present a substantial Fourteenth Amendment claim or First Amendment claim that would warrant the appointment of counsel.

In his Complaint, Mr. Starbuck asserts that Defendant's actions, as detailed above, violated J.F.S.'s rights under the Fourteenth Amendment and the First Amendment. With

respect to the Fourteenth Amendment claim, it is well settled that "[s]tudents facing temporary suspension have interests qualifying for protection of the Due Process Clause" of the Fourteenth Amendment. *Goss v. Lopez*, 419 U.S. 565, 581 (1975). If a student is facing a "suspension of 10 days or less," the United States Supreme Court has explained that the student need only be given "oral or written notice of the charges against him and, if he denies them, an explanation of the evidence the authorities have and an opportunity to present his side of the story." *Id.* This requirement, described as a "notice and rudimentary hearing" or an "informal give-and-take between student and disciplinarian," constitutes sufficient due process under the Fourteenth Amendment when conducted "as soon as practicable" after the alleged misconduct occurs.[5] *Id.* at 581-84.

Here, although Mr. Starbuck finds fault with the manner in which Defendant handled J.F.S.'s in-school suspension and two-day, out-of-school suspension, Mr. Starbuck alleges that (i) J.F.S. was placed on in-school suspension for the remainder of the day after a teacher overheard J.F.S.'s remarks regarding a recent school shooting, (ii) during the in-school suspension, J.F.S. spoke with school officials, psychologists, service counselors, and principals, (iii) Defendant contacted J.F.S.'s parent at 17:30 on the same day to discuss the issues and notify her of a subsequent two-day, out-of-school suspension, and (iv) on the third school day following the school shooting conversation, a meeting was held with the assistant principal, a hearing officer, a guidance counselor, J.F.S., Mr. Starbuck, and J.F.S.'s mother. Compl. at 7-8. Based

[5] The United States Supreme Court has further explained that due process, in the context of "short suspensions," does not require the student to receive a hearing with "the opportunity to secure counsel, to confront and cross-examine witnesses supporting the charge, or to call his own witnesses to verify his version of the incident." *Goss*, 419 U.S. at 583. Because "[b]rief disciplinary suspensions are almost countless," such a requirement "might well overwhelm administrative facilities in many places and, by diverting resources, cost more than it would save in educational effectiveness." *Id.*

on these alleged facts, it appears to the Court that Defendant conducted an "informal give-and-take between student and disciplinarian" with respect to J.F.S.'s short-term suspension "as soon as practicable" after the alleged misconduct occurred. Accordingly, the Court finds that the factual allegations set forth in Mr. Starbuck's Complaint do not present a substantial due process claim under the Fourteenth Amendment that would warrant the appointment of counsel.

With respect to the First Amendment claim, it is without question that "students do not 'shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.'" *Hardwick v. Heyward*, 711 F.3d 426, 434 (4th Cir. 2013) (quoting *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969)). However, "the constitutional rights of students in public school are not automatically coextensive with the rights of adults in other settings." *Id.* "Courts must therefore analyze First Amendment violations alleged by students, 'in light of the special characteristics of the school environment.'" *Brown v. Cabell Cty. Bd. of Educ.*, 714 F. Supp. 2d 587, 591 (S.D. W. Va. 2010) (quoting *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260 (1988)). Notably, "school officials may prohibit or punish student speech that would 'materially and substantially interfer[e] with the requirements of appropriate discipline in the operation of the school [or] collid[e] with the rights of others.'" *Hardwick*, 711 F.3d at 434 (quoting *Tinker*, 393 U.S. at 513)) (alterations in original). If the school officials "reasonably forecast a substantial disruption" arising from the student's speech, the school officials "may act to prevent that disruption without violating a student's constitutional rights, and [the federal courts] will not second guess their reasonable decisions."[6] *Id.* at 440.

[6] In *Hardwick*, the Fourth Circuit explained that "[b]ecause school officials are far more intimately involved with running schools than federal courts are, '[i]t is axiomatic that federal courts should not lightly interfere with the day-to-day operation of schools.'" *Hardwick*, 711 F.3d at 440 (citations omitted). Further, in the context of First Amendment claims in the school

Here, although Mr. Starbuck claims that Defendant violated J.F.S.'s rights under the First Amendment, Mr. Starbuck alleges that (i) the day after a school shooting occurred in Parkland, Florida, a teacher overheard a conversation in which J.F.S. discussed "the intent of the shooter," the shooter's capability to inflict "more harm had he wanted to," the shooter's "possession of explosives," the length of "time the shooter was left alone within the building unchallenged by local law enforcement," and the shooter's "use of the fire alarm to lure students out," and (ii) Defendant considered J.F.S.'s remarks to be a threat, or at least a "classroom disturbance," that justified a short-term suspension. Compl. at 2, 5-6. Under these particular circumstances, the Court finds that the factual allegations set forth in Mr. Starbuck's Complaint do not present a substantial First Amendment claim that would warrant the appointment of counsel.

Because the Court finds that (i) Mr. Starbuck cannot represent the interests of J.F.S. on a *pro se* basis, and (ii) the appointment of counsel is not warranted, this matter is hereby **DISMISSED** without prejudice. Mr. Starbuck and J.F.S. are cautioned that the statutes of limitations on J.F.S.'s claims continue to run.

V. Conclusion

For the reasons set forth above, this matter is hereby **DISMISSED** without prejudice. Mr. Starbuck and J.F.S. are cautioned that the statutes of limitations on J.F.S.'s claims continue to run.

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setting, courts have recognized that "we live in a time when school violence is an unfortunate reality that educators must confront on an all too frequent basis," and that "[s]chool administrators must be vigilant and take seriously any statements by students resembling threats of violence." *Bell v. Itawamba Cty. Sch. Bd.*, 799 F.3d 379, 393 (5th Cir. 2015) (citing *Lavine v. Blaine Sch. Dist.*, 257 F.3d 981, 987 (9th Cir. 2001); *Ponce v. Socorro Indep. Sch. Dist.*, 508 F.3d 765, 771 (5th Cir. 2007)).

Mr. Starbuck may appeal this Dismissal Order by forwarding a written notice of appeal to the Clerk of the United States District Court, Newport News Division, 2400 West Avenue, Newport News, Virginia 23607. The written notice must be received by the Clerk within thirty days from the date of entry of this Dismissal Order.

The Clerk is **DIRECTED** to send a copy of this Dismissal Order to Mr. Starbuck.

IT IS SO **ORDERED**.

/s/

Mark S. Davis
UNITED STATES DISTRICT JUDGE

Norfolk, Virginia

September 10, 2018